UPPER TRIBUNAL (LANDS CHAMBER)

[2016] UKUT 366 (LC)
UTLC Case Number: LRX/10/2016 and LRX/51/2015

TRIBUNALS, COURTS AND ENFORCEMENT ACT 2007

IN THE MATTER OF APPLICATIONS UNDER SECTION 27A, LANDLORD AND TENANT ACT 1985

LANDLORD AND TENANT – SERVICE CHARGES – preliminary issues – major work to be undertaken by head landlord – whether duty to consult falls on head landlord or intermediate landlord – long term qualifying agreement – case management applications

BETWEEN:

LRX/10/2016

LEASEHOLDERS OF FOUNDLING COURT AND O'DONNELL COURT

Applicants

(1) THE MAYOR AND BURGESSES OF THE LONDON BOROUGH OF CAMDEN
(2) ALLIED LONDON (BRUNSWICK) LIMITED
(3) BRUNSWICK GP LIMITED
(4) BRUNSWICK NOMINEE LIMITED
(5) BIS (POSTAL SERVICES ACT 2011 COMPANY) LIMITED

Respondents

Re: Foundling Court and O'Donnell Court,
The Brunswick Centre, Brunswick Square,
London WC1

Martin Rodger QC, Deputy President

The Royal Courts of Justice

25 July 2016

Justin Bates and *Riccardo Calzavara*, instructed by Brethertons, solicitors, for the Applicants
Jonathan Upton, instructed by Judge & Priestly LLP, for the First Respondents
Nicola Muir, instructed by Firsters LLP, for the Second Respondent
Camilla Lamont, instructed by Nabarro LLP, for the Third, Fourth and Fifth Respondents

The following cases are referred to in this decision:

Daejan Investments Ltd v Benson [2013] UKSC 14

Homburg Houtimport BV v Agrosin Private Ltd (The Starsin) [2004] 1 AC 715

Hunter v Chief Constable of the West Midlands Police [1982] AC 529

Laing v Taylor Walton (a firm) [2007] EWCA Civ 1146

Oakfern Properties Ltd v Ruddy [2006] EWCA Civ 1389

Paddington Basin Developments Ltd v West End Quay Estate Management Ltd [2010] 1 WLR 2735

Paddington Walk Management Ltd v Governors of Peabody Trust [2010] L&TR 6

Parissis v Blair Court (St John's Wood) Management Ltd [2014] UKUT 503 (LC)

Poynders Court Ltd v GLS Property Management Ltd [2012] UKUT 339 (LC)

Summary of conclusions

For the reasons which follow, my conclusions on the preliminary issues are:

1. The statutory obligation to consult the long residential leaseholders before carrying out qualifying works or entering into qualifying long term agreements was an obligation imposed on Allied London, and not on Camden, and required Allied London to consult both Camden and the individual leaseholders.

2. The 2009 Security Contract was not a qualifying long term agreement.

3. The applications by Allied London and by Camden to strike out the leaseholders' claim that the major works were not done to a reasonable standard are refused.

4. Further consideration of the issues raised in paragraph 37(d) of the leaseholders' amended statement of case, and in the Scott schedule which supplements it, is stayed until after the current remediation works have been completed and it is known whether they have been successful.

Introduction

1. Foundling Court and O'Donnell Court are parts of the Brunswick Centre, a Grade II listed complex of shops, flats, offices, car parks and other premises at Brunswick Square, London WC1.

2. There are 408 flats in the Brunswick Centre, of which 87 are let on long leases. 49 of the applicants ("the leaseholders") are the current or (in 2 cases) former leaseholders of flats in Foundling Court and O'Donnell Court, which they hold on long leases which require them to contribute through a service charge towards certain costs incurred by their landlord, the London Borough of Camden ("Camden"). The scope of the leaseholders' liability may depend on the particular form of lease they hold, but that is an issue for a later date.

3. Camden holds a long lease of parts of the Brunswick Centre, including Foundling Court and O'Donnell Court, out of which the leaseholders' interests were created. That lease, which I will refer to as "the Headlease", was granted on 26 February 1982 for a term of 99 years from December 1973. Camden is liable to contribute through a service charge in the Headlease towards costs incurred by its landlord, the freeholder of the Brunswick Centre. Camden also has responsibilities of its own to keep parts of the buildings in repair.

4. In September 2000 the freehold interest in the Brunswick Centre was acquired by the second respondent, Allied London (Brunswick) Ltd ("Allied London").

5. In 2005 major works were carried out by Allied London. These were completed in 2006, but the works were not a success, and further remedial work was required.

6. Allied London sold its interest in 2007 to the third and fourth respondents, who sold it in 2012 to the fifth respondent. In November 2014 the freehold was acquired by Lazari Investments Ltd ("Lazari"), the current freeholder, which is not a party to these proceedings.

7. Some or all of the third, fourth and fifth respondents, and Lazari, have incurred costs in trying to remedy the defects in the major works. Lazari is currently carrying out further works to resolve the problems, and some at least of the original Allied London works appear to be being re-done entirely.

8. Camden paid the service charges demanded by Allied London under the Headlease at the time the major works were carried out. The leaseholders made interim contributions to Camden but, when it became apparent that there were problems with the quality of the works, Camden told them that they need not pay the final account until those problems were resolved.

9. This is an application by the leaseholders under section 27A, Landlord and Tenant Act 1985, to determine the extent to which they are liable to contribute (a) to the costs of the 2005 major works, (b) to the cost of external repairs and decorations and the replacement of communal heating and hot water systems by Camden in 2007, and (c) to other costs incurred by the freeholder and paid by Camden as part of its service charge under the Headlease but towards which the leaseholders consider they ought not to have contributed. The full period covered by the disputed charges is from 2008 to 2015.

10. Issues are also raised in the application about the correct basis of apportionment of the service charges between the different types of occupier of the Brunswick Centre.

11. The leaseholders have been advised that, to the extent that they are found to have paid more to Camden than they ought to have done, they will be entitled to seek restitution of the balance. Camden intends to seek restitution of its own from the other respondents of any sums which it has to repay to the leaseholders, and for that reason it sought and obtained orders joining the other respondents as parties to the proceedings so that they be heard on the leaseholders' issues and explain what work they had done.

12. Because of the scale and complexity of some of the issues raised, at the direction of the Chamber President of the First-tier Tribunal (Property Chamber) the application was transferred from the Property Chamber to this Tribunal on 25 January 2016 pursuant to rule 25 of the Property Chamber Rules 2013.

Issues

13. At a case management hearing on 21 April 2016 the Tribunal directed the determination of the following preliminary issues:

(1) Whether the statutory obligation to consult the leaseholders before carrying out qualifying works or entering into qualifying long term agreements was an obligation imposed on the freeholder or on Camden.

(2) Whether an agreement dated 25 November 2009 ("the 2009 Security Contract") made between the Third and Fourth Respondents and Senator Security Services Ltd was a qualifying long term agreement on which the leaseholders were entitled to be consulted.

(3) Whether the leaseholders' challenge to the cost of the major works carried out by Allied London in 2005 should be struck out as an abuse of process.

14. An unless order was also made at the same hearing striking out part of the leaseholders' case unless they provided details in the form of a Scott schedule of the basis on which they challenged the 2005 major works. The issue of the leaseholders' compliance with that order was left over for determination at the hearing of the preliminary issues.

Issue 1: Who ought to have consulted the leaseholders?

15. The first issue is one of general importance. It concerns the consultation requirements contained in Part 2 of Schedule 4 of the Service Charges (Consultation Requirements) (England) Regulations 2003 ("the 2003 Regulations"). Expressed in general terms the issue is whether, when the tenant of a dwelling is obliged to pay a service charge to his or her immediate landlord in respect of the cost of works carried out by a superior landlord, the requirements imposed by the 2003 Regulations to consult the tenant before the works are carried out must be satisfied by the superior landlord or by the immediate landlord.

16. In the terms in which it has been formulated by the parties the preliminary issue assumes that the tenant ultimately liable to pay for the works is entitled to be consulted in the circumstances described. In the course of argument it became apparent that one possible construction of the relevant statutory provisions is that such a tenant is not entitled to be consulted at all, and that the only consultation required is between the superior landlord and the intermediate landlord.

17. The parties concerned in the first preliminary issue are Allied London, which owned the freehold interest in the Brunswick Centre between September 2000 and June 2007, and Camden. The leaseholders were initially only interested spectators but their interest in the issue increased as the arguments were explored.

Relevant statutory provisions

18. Sections 18 to 30 of the Landlord and Tenant Act 1985 create a series of statutory limitations on the contractual obligations of the tenants of dwellings to pay variable service charges. To appreciate the scope of those provisions it is necessary to consider the meaning of certain defined expressions and how they have been interpreted.

19. By section 18(1) a service charge is "an amount payable by the tenant of a dwelling … for services, repairs [etc] … which varies or may vary according to the relevant costs". The "relevant costs are the costs … incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable" (s.18(2)).

20. The expression "tenant" is defined in sections 30 and 36 of the 1985 Act, together with landlord, lease and tenancy, in terms also employed in other statutes concerned with residential property (including section 59 of the Landlord and Tenant Act 1987 and section 101 of the Leasehold Reform Housing and Urban Development Act 1993). By section 30 of the 1985 Act "landlord" includes any person who has a right to enforce payment of a service charge, and "tenant" includes (where the dwelling or part of it is sub-let) a sub-tenant.

21. By section 36(1)-(2) the words "lease" and "tenancy" have the same meaning; both expressions include a sub-lease or sub-tenancy, and an agreement for a lease or tenancy (or sub-lease or sub-tenancy).

22. A "dwelling" is defined in section 38 to mean "a building or part of a building occupied or intended to be occupied as a separate dwelling …"

23. In *Oakfern Properties Ltd v Ruddy* [2006] EWCA Civ 1389, the Court of Appeal held that a tenant may be the tenant of a dwelling for the purposes of the 1985 Act, despite the fact that the property comprised in the relevant tenancy comprises more than one dwelling, or comprises a dwelling and commercial premises. Thus it is common ground in these proceedings that each of the flats at Foundling Court and O'Donnell Court is a dwelling and that, by virtue of the Headlease, Camden is the tenant of each of those dwellings. The service charges payable by Camden to the freeholder under the Headlease are therefore service charges within the meaning of section 18(1) of the 1985 Act.

24. The relevant limitations on the recoverability of service charges requiring prior consultation with tenants are found in section 20 of the 1985 Act, supplemented by section 20ZA and by the 2003 Regulations. Section 20 applies to qualifying works or to a qualifying long term agreement if the relevant costs incurred in respect of the works or under the agreement exceed an amount set by regulations (s.20(3)-(4)). Where the consultation requirements have not been satisfied or dispensed with, subsections (6) and (7) of section 20 limit the relevant contributions of each tenant to

a prescribed amount. The consultation thresholds and the sums recoverable in the event of non-compliance with the consultation requirements are currently set at £100 a year for services provided under qualifying long term agreements and £250 for qualifying works (regulations 4(1) and 6, 2003 Regulations).

25. As for the consultation requirements themselves, section 20 provides:

> 20. **Limitation of service charges: consultation requirements**
>
> (1) Where this section applies to any qualifying works or qualifying long term agreement, the relevant contributions of tenants are limited in accordance with subsections (6) or (7) (or both) unless the consultation requirements have been either:
>
> (a) complied with in relation to the works or agreement, or
>
> (b) dispensed with in relation to the works or agreement by (or an appeal from) the appropriate tribunal.
>
> (2) In this section "relevant contribution" in relation to a tenant and any works or agreement, is the amount which he may be required under the terms of his lease to contribute (by the payment of service charges) to relevant costs incurred on carrying out the works or under the agreement.

26. Section 20ZA(4) provides that "the consultation requirements" mean requirements prescribed by regulations made by the Secretary of State. The 2003 Regulations were made under that power.

27. By regulation 1(3) of the 2003 Regulations, the Regulations apply (in England) where a landlord:

> (a) intends to enter into a qualifying long term agreement to which section 20 applies on or after the date on which the Regulations came into force (which was 31 October 2003); or
>
> (b) intends to carry out qualifying works to which that section applies on or after that date.

28. Specific consultation requirements in respect of different categories of qualifying works and qualifying long term agreements are set out in the schedules to the 2003 Regulations. Each schedule contains a code of consultation applicable in the circumstances to which it relates. The relevant schedules in this case are Schedule 4, for qualifying works, and Schedule 1, for qualifying long term agreements for which public notice is not required, although the critical requirements are the same in all four schedules.

29. In each schedule, paragraph 1 provides as follows:

> 1(1) The landlord shall give notice in writing of his intention to [enter into the agreement or carry out qualifying works, as the case may be]
>
> (a) to each tenant; and
>
> (b) where a recognised tenants' association represents some or all of the tenants, to the association.

30. The first question for determination is whether "the landlord" referred to in paragraph 1 is (a) Allied London, which carried out the works, and was entitled to recoup part of the cost from Camden by means of the service charge provisions in the Headlease, or (b) Camden, which was entitled to pass on part of the cost it had paid to the leaseholders of each of the flats, or (c) both Allied London and Camden.

31. The second question is whether in the case of a consultation notice required to be given by Allied London the expression "each tenant" in paragraph 1(1) means just Camden, or whether it also includes the leaseholders of individual flats; it is not disputed that, if Camden was required to give notice, then it should have given it to each leaseholder.

32. The consultation requirements may be dispensed with by the appropriate tribunal if it is satisfied that it is reasonable to do so (s.20ZA(1)). In *Daejan Investments Ltd v Benson* [2013] UKSC 14 Lord Neuberger PSC explained at [42] that the purpose of sections 20 and 20ZA is to give practical effect to the statutory protection conferred on tenants by section 19(1) of the 1985 Act; that protection is designed to ensure that tenants of flats are not required (i) to pay for unnecessary services or services which are provided to a defective standard, or (ii) to pay more than they should for services which are necessary, and are provided to a reasonable standard. At [46] Lord Neuberger emphasised that adherence to the consultation requirements is not an end in itself, but is a means to securing the protection conferred by section 19(1) and that the dispensing jurisdiction should be exercised with that purpose in mind.

The facts

33. On 11 June 2004 Allied London gave notice to Camden, as Head leaseholder, that Allied London intended to carry out the works described in a schedule to the notice. The works include concrete and render repairs, the replacement of waterproofing and paving to external areas, the replacement of mechanical and electrical services and a survey of other service installations.

34. The consultation notice invited Camden to provide any observations it might wish to make in relation to the works by 16 July 2004.

35. Allied London's consultation notice was intended to satisfy the first stage of the consultation requirements which requires a notice to be given to each tenant and recognised tenant's association describing the proposed works and explaining why they are thought by the landlord to be necessary, and inviting observations "which must be delivered within the relevant period" (30 days beginning with the date of the notice, (regulation 2(1))).

36. Allied London did not send similar notices to the leaseholders of the individual flats.

37. On 17 June 2004 Camden wrote to each of the leaseholders enclosing a copy of Allied London's consultation notice and inviting any observations by 14 July 2014, 30 days from the date of Camden's letter.

38. According to Camden's statement of case in these proceedings, eight leaseholders responded to the consultation by Camden within the periods allowed and their observations were passed on by Camden to Allied London on 16 July 2004, which was the last day Allied London had given for Camden to respond with its own comments.

39. The consultation requirements also require that a second stage of consultation: once estimates for carrying out the intended work have been received by the landlord from potential contractors, a further statement must be sent "to each tenant" and to any recognised tenants' association setting out the amount of the estimates, summarising the observations received at the first stage of consultation, and inviting further observations (Schedule 4, Part 2, paragraph 4).

40. A second stage consultation notice was sent by Allied London to Camden on 24 September 2004, and once again Camden forwarded a copy to each of the leaseholders with a request for any observations they might wish to make. Camden's letter was sent on 4 October and asked for leaseholders' observations to be sent to it within 21 days which Camden would then collate and forward to Allied London; observations were received from two leaseholders and these were sent by Camden to Allied London on 19 November 2004. Camden acknowledges that its letter forwarding the second stage consultation notice did not allow the required 30 days for a response and, to that extent, there was a limited failure to comply with the consultation requirements.

The rival submissions

41. The leaseholders' case is that Allied London did not consult them on the major works at all, and that although Camden did consult them it allowed less than the required 30 days for observations in relation to the second stage notice. The leaseholders are agnostic on the issue of whether the obligation to consult them lay with Allied London or with Camden, apparently taking comfort instead from the submission that until one or other of the landlords seeks dispensation from the

consultation requirements (which neither has yet done) their contributions are limited to £250 per flat.

42. On behalf of Camden Mr Upton submitted that the 1985 Act makes no express provision for circumstances in which a superior landlord intends to carry out major works or enter into a qualifying long term agreement and an intermediate landlord, responsible for contributing towards those costs, is entitled to pass them on to sub-leaseholders. Nevertheless, he submitted, the effect of the statutory provisions was that the obligation to consult the leaseholders lay with Allied London, and not with Camden. Alternatively, if Allied London was not required to consult the leaseholders, that did not mean that Camden was required to do so.

43. Mr Upton pointed out that in light of the decision of the Court of Appeal in Oakfern Properties v Ruddy, Camden was a "tenant of a dwelling" even though the Headlease included more than one dwelling. Camden's contribution to the costs of the major works was therefore a "service charge" within the meaning of section 18(1) and Camden was entitled to be consulted by Allied London, as it had been. Camden had had no intention of its own to enter into any qualifying long term agreement or carry out any qualifying works and if the 2003 Regulations applied at all it was because of Allied London's intentions. Mr Upton submitted that the requirement to serve a notice of intention and to have regard to the observations of leaseholders on the proposed works could only sensibly be imposed on the person who intended to carry out the works. Any requirement for Camden to have done these things would have been pointless.

44. Mr Upton also suggested that the requirement imposed on a landlord by paragraph 1(1) of the schedules to the 2003 Regulations to give notice "to each tenant" of its intention to enter into a qualifying long term agreement or carry out qualifying works, should be understood as an obligation to give notice to each tenant and to each sub-tenant, where any part of the building was sublet.

45. On behalf of Allied London Ms Muir noted that at the time it carried out the works Allied London was not "the landlord" of the leaseholders and they were not its tenants. There was no privity of contract between Allied London and the leaseholders of the individual flats. She submitted that Allied London was therefore under no obligation to consult the leaseholders, and had complied with its obligation to consult Camden, which was the only party with whom it was in a landlord and tenant relationship.

46. Ms Muir pointed out that section 30 of the 1985 Act defines "landlord", "tenant", "lease" and "tenancy" in conventional terms with no extended meaning (except so far as the definition of a landlord is broadened so as to include a management company or any other person with a right to enforce payment of a service charge). Allied London had no a right to enforce payment of a service charge against the leaseholders and was not within that extended meaning.

47. By stipulating that "tenant" includes "sub-tenant" section 30 of the 1985 Act did not change the meaning of "tenant". It simply meant that the leaseholders were not prevented from being tenants of Camden because their interest was created by a sub-tenancy rather than a tenancy. The leaseholders were not tenants of Allied London in the relevant sense.

48. Nor did section 36 change what a landlord or tenant were. By providing that a lease includes a sub-lease it simply meant that the individual leases granted by Camden to the leaseholders did not cease to be leases for the purposes of the Act just because they were sub-leases. That definition did not convert the leaseholders' sub-leases from Camden into leases from Allied London.

49. Each party emphasised the practical difficulties and anomalies which would be created if the construction favoured by the other was to be preferred.

50. The statutory scheme requires observations to be submitted by tenants within 30 days of the date on which a consultation notice is given (referred to as "the relevant period"). Mr Upton pointed out that there was insufficient time for Camden to consult its own leaseholders in response to a consultation notice given to it by Allied London if that notice allowed only the minimum 30 day relevant period for a response (which was all it was required to do no matter how many sub-leases there might be). An intermediate landlord in receipt of such a notice would not have sufficient time to consult its own sub-tenants and to allow them their own relevant period of 30 days, before the period for its observations expired.

51. Ms Muir made equally powerful points on behalf of Allied London. If Camden's submission was right Allied London was required to consult up to 408 leaseholders, none of whom it had any contractual relationship with and whose names, addresses and tenures it would not know. That information might be available from the Land Registry but only for registered leases. A short lease with a service charge would not be registered. Nor would a superior landlord necessarily know whether there was a recognised tenant's association which would also need to be consulted. Consultation is only necessary in relation to works to which the tenant is required to make a relevant contribution, but the superior landlord would not know the terms of individual leases. It would therefore not know whether it was under a statutory obligation to consult particular leaseholders, or to have regard to their observations. Nor would it have any way of compelling the cooperation of the intermediate landlord, with whom it did have a relationship.

52. Ms Muir also submitted that if Parliament had intended the freeholder to consult leaseholders with whom it had no contractual relationship, the 1985 Act would have facilitated this, as did other statutes. In the Leasehold Reform Housing and Urban Development Act 1993, for example, section 11 gives a qualifying tenant a right to obtain information about superior interests. In the 1985 Act itself, section 23 gives a sub-tenant the right to request information from its own immediate landlord not only about costs incurred by that landlord, but also about costs incurred by a superior

landlord, and imposes obligations on the intermediate landlord to pass on requests for information as necessary and on the superior landlord to comply with it, with a reasonable time being allowed for a response to be provided (rather than the fixed period allowed by section 22 in relation to the provision of information about the immediate landlord's own costs). No similar modification of the consultation requirements was made to accommodate consultation with sub-tenants, which cannot therefore have been intended to be undertaken by superior landlords.

Discussion

53. It is possible that neither the drafters of the 1985 Act nor those of the 2003 Regulations considered whether, or how, the consultation requirements were to be satisfied when qualifying works are undertaken by a superior landlord at the ultimate expense of a sub-tenant. Such an omission would be a little surprising, not only because such a structure is very common, but also because it is specifically envisaged by section 23 of the Act which modifies the right to information conferred on tenants by section 22 to accommodate the need to consult landlords further up the chain of title. One might have expected a similar mechanism, in reverse, for superior landlords to consult sub-tenants, but no such mechanism is found in the Act itself or in the regulations.

54. Nevertheless the primary purpose of the regime established by sections 20 and 20ZA, and by the 2003 Regulations, is to ensure that those who are ultimately responsible for paying for work or services are consulted and practical difficulties which might be encountered by landlords in complying with those obligations cannot dominate their interpretation. Any construction of the statute or regulations which frustrated the clear purpose of the consultation regime would be unacceptable.

55. Before it can be ascertained whether a tenant is entitled to the statutory limitation on service charges in relation to qualifying works three matters have to be established. The first is whether the section applies to the works; the second is the identity of the relevant consultation requirements; and the third is whether those requirements have been satisfied or dispensed with.

56. Importantly, the answer to the first question is independent of the identity of the person carrying out the qualifying works. The sole determinant of whether the section 20(1) limitation applies, which is identified in section 20(3), is whether the relevant costs incurred in carrying out the qualifying works exceed the appropriate amount specified in regulations made under section 20(4). The limitation therefore applies equally to costs incurred by a landlord and by a superior landlord. That this is so is also made clear by the definition of "relevant costs" in section 18(1): these are "costs … incurred … by or on behalf of the landlord, or a superior landlord".

57. There is no doubt that in this case the costs incurred by the superior landlord exceeded the appropriate amount. It follows that the consultation requirements apply

to those costs, and that the relevant contributions of each tenant entitled to be consulted will be limited to £250 if the requirements have not been satisfied or dispensed with. It is common ground that, in relation to the major works, the relevant consultation requirements are those in Part 2 of Schedule 4 to the 2003 regulations.

58. In considering whether the consultation requirements have been satisfied the starting point is to identify the person who is required to undertake the consultation. In my judgment the answer to that question is clear. By regulation 1(3) the 2003 Regulations as a whole apply "where a landlord … intends to carry out qualifying works", and provision is made for that landlord to invite, receive and consider observations on its proposed works. When paragraph 1(1)(a) of the Schedules requires "the landlord" to give notice to "each tenant" it can only refer to the landlord who satisfies the description in regulation 1(1), i.e. the landlord who intends to do the work and whose intention is the reason the Regulations apply at all, and not to some subordinate landlord who has no such intention.

59. I reject a submission made by Ms Muir that it is possible to describe a landlord which is itself under a primary obligation to its tenant to carry out works, but who satisfies that obligation by paying for works carried out by a superior landlord, as a landlord which "intends to carry out qualifying works", so making it a landlord within the scope of the regulations. That is not a natural reading of regulation 1(1) or paragraph 1(1) of the Schedules, and it would be a pointless reading in the absence of a requirement for such an intermediate landlord to pass on the observations of its tenants to the superior landlord which actually intends to carry out the qualifying works.

60. In this case, therefore, the only landlord on whom a consultation requirement was imposed was Allied London, because it was the only landlord which had the relevant intention to carry out qualifying works.

61. To whom should the consultation notice have been given? Allied London was obliged by paragraph 1(1) of the Schedule to give a consultation notice to "each tenant" and to any recognised tenants' association. Where a dwelling is sub-let the expression "tenant" includes a sub-tenant. Allied London was therefore required to give a consultation notice to each tenant or sub-tenant. To construe the requirement in that way does not involve giving an extended or unnatural meaning to the word "tenant", but simply gives appropriate weight, in the context, to the word "each". The requirement to consult "each tenant" means every person who is a tenant (which includes every person who is a sub-tenant) of a dwelling and liable to contribute through a service charge to the relevant costs. (It is implicit that only a tenant or sub-tenant liable to contribute to the cost of the works need be consulted, since the whole purpose of sections 18 to 30 of the 1985 Act is to provide protection to such tenants.)

62. I do not accept Ms Muir's submission that a person cannot be a tenant for the purpose of the consultation requirements unless a direct relationship of landlord and

tenant exists between that person and the landlord who intends to carry out qualifying work. I dismiss that construction for five related reasons.

63. First, because to accept it would frustrate the purpose of the Act and deprive those who are ultimately obliged to pay for qualifying works of the opportunity to be consulted on the extent of the works and the identity of the contractor who will carry them out.

64. Secondly, because it would be inconsistent with section 18(2) and the extension of "relevant costs" to include costs incurred by a superior landlord. The definition would not be wholly redundant, since it plays an important role in section 19(1), yet it would be inconsistent for the scope of sections 19(1) and 20 to be different, since the one is intended to bolster the other. It would therefore be odd for costs incurred by a superior landlord to be taken into account in determining the amount of a service charge only to the extent that they were reasonably incurred (section 19(1)) yet for those same costs not to be within the scope of the consultation requirements in section 20.

65. Thirdly, because it would be inconsistent with the definition of "qualifying long term agreement" in section 20ZA(2), which is an agreement entered into by or on behalf of the landlord or a superior landlord. The concept of a qualifying long term agreement is relevant only to the consultation requirements. If those requirements provide only for consultation between landlords and their immediate tenants there would be no circumstances in which consultation could be required on an agreement entered into by or on behalf of a superior landlord, which would make part of the definition in section 20ZA(2) redundant.

66. Fourthly, paragraph 1(1)(b) of the Schedules to the 2003 Regulations imposes a duty on a landlord who intends to carry out qualifying works to give notice to any recognised tenants' association. The suggestion that a superior landlord need only consult its own immediate tenants and need not consult anyone with whom it is not in a direct contractual relationship is therefore not correct. I do not think it is permissible to restrict the scope of paragraph 1(1)(b) so that it applies only to a recognised tenants' association representing immediate tenants of the landlord, as Miss Muir submitted, since once again that would frustrate the purpose of the consultation regime.

67. Finally it would be strange if the same sub-tenant on whom section 23 confers a right to receive information about the costs which have been incurred by a superior landlord was not also entitled to be consulted before those costs were incurred.

68. The proper construction of the consultation requirements is therefore that a superior landlord intending to carry out works or enter into a qualifying long term agreement must give notice to each of its direct tenants of a dwelling, and each of its

own tenants' sub-tenants of a dwelling or dwellings who is liable to contribute towards the costs of the works. Thus, consultation is required with any intermediate tenant of premises which include a dwelling (for the reasons explained in *Oakfern Properties v Ruddy*), such as Camden in this case, and with all sub-tenants of individual dwellings or of larger premises which include at least one dwelling.

69. I do not think the practical difficulties suggested by Miss Muir are a sufficient reason to reject this construction which seems to me to be the natural effect of the statutory language. The only viable alternative construction (that the landlord intending to do the work must consult its own direct tenants only, those tenants being under no obligation of their own to consult further down the chain of title) would impermissibly frustrate the object of the statute.

70. The real practical difficulty for a superior landlord seems to me to be how it is to know the identity of those whom it is required to consult. That is undoubtedly a problem, and exposes a lacuna in the statutory scheme, but a superior landlord who does not know the identity of all of the sub-tenants liable to contribute through their own sub-leases to the cost of qualifying works has a number of relatively straightforward courses of action available.

71. The simplest and cheapest approach would be to deliver a consultation notice addressed to "the leaseholder" to each flat in the building or development. It may not be guaranteed that a notice given in that way would come to the attention of every leaseholder, but as the 1985 Act contains no service provisions and does not require each tenant to be given notice by name, proof of receipt may not matter. Persons who are not entitled to be consulted might perhaps submit observations, but that could be discouraged by an appropriately worded notice and might in any case be regarded as a risk of no great significance.

72. The better course may be for the superior landlord to obtain the necessary information by asking the intermediate landlord (or intermediate landlords) to provide it. Intermediate landlords might be thought to have a vested interest in cooperating in the provision of such information since, if they do not and the consultation requirements are not satisfied, the service charge which they are contractually entitled to collect from their sub-tenants will be limited to £250 per dwelling unless a dispensation can be obtained. The uncooperative intermediate landlord might think that the same limitation would apply to its own liability to the head landlord but that could not be guaranteed, and the diligent head landlord might in those circumstances have a stronger case for dispensation.

73. The alternative course open to a superior landlord would be to seek a dispensation from the consultation requirements either before carrying out the qualifying work or entering into the relevant agreement or after doing so if the issue of consultation subsequently became contentious. If asked for a dispensation in advance the appropriate tribunal could be expected to grant it on suitable terms

designed to ensure that, so far as possible, notice of the consultation came to the attention of all those entitled to receive it (by placing notices in the common parts or distributing notices addressed to "the leaseholder", for example). It was suggested in argument that the first-tier tribunal would require notice of a dispensation application to be given to every tenant who was required to pay a service charge, but there is no such requirement in section 20(1) and a superior landlord which did not know the identity of every such tenant would have a good case for a less stringent requirement to be imposed.

74. Finally it is relevant to note the important role that the dispensing power plays in the statutory scheme, especially in cases where compliance with the consultation requirements may be difficult. In *Paddington Basin Developments Ltd v West End Quay Estate Management Ltd* [2010] 1 WLR 2735 the issue was whether an estate management deed was a qualifying long term agreement; it was argued, for reasons that do not matter, that because of the nature of the agreement it could not sensibly have been the subject of consultation and so should not be regarded as falling within the scope of the consultation requirements. Lewison J rejected that submission in terms which are equally applicable to Allied London's practicality arguments in this case:

> "Assuming (without deciding) that it is difficult to apply the consultation requirements, that would lead to the conclusion that it would be reasonable to dispense with them. The leasehold valuation tribunal has power to dispense with all or any of the requirements. It may do so either prospectively or retrospectively … The very fact that Parliament provided for the dispensation of the consultation requirements shows, in my judgment, that it contemplated that agreements might well fall within the definition of qualifying long term agreements even though the consultation requirements might be difficult, or even impossible, to apply."

Conclusion

75. For these reasons the answer to the first preliminary issue is that the statutory obligation to consult the leaseholders before carrying out qualifying works or entering into qualifying long term agreements was an obligation imposed on Allied London, and not on Camden, and that the obligation required Allied London to consult the individual leaseholders, and not just Camden.

Issue 2: Was the 2009 Security Contract a qualifying long term agreement?

76. The parties concerned in the second preliminary issue are the leaseholders and the third and fourth respondents who owned the freehold interest in the Brunswick Centre between June 2007 and April 2012.

77. The short point for determination is whether an agreement entered into by the third and fourth respondents with Senator Security Services Ltd was a qualifying long term agreement within the meaning of s.20ZA of the 1985 Act. The fees payable

under the contract totalled £357,505.24 of which, I assume, Camden's liability would be a little under £90,000 to be apportioned over its 400 plus flats, leaving each of its leaseholder liable to contribute about £220.

78. Under s.20ZA"qualifying long term agreement" means, so far as is now material, "an agreement entered into by or on behalf of the landlord or a superior landlord, for a term of more than twelve months".

79. The 2009 Security Contract was an agreement entered into by a superior landlord, the third and fourth respondents, as partners in a limited partnership, acting by their agent Cushman & Wakefield LLP. The short issue is whether it was for a term of more than 12 months.

80. The agreement was in the form of a standard Cushman & Wakefield LLP "Framework Agreement Template" which was printed from a database on 5 November 2009. The template was a framework agreement comprising agreed terms which could be adopted and applied to the provision of security services at different sites identified from time to time. Each new site was to be the subject of its own "Site Schedule".

81. The body of the agreement (and the completed Site Schedule) were both signed by a director of Senator on its behalf on 5 November 2009, and by Cushman & Wakefield LLP as agent for the third and fourth respondents on 24 November 2009. The cover page of the Agreement bears the date of the following day, 25 November.

82. Expressions used in the contract are defined in clause 1.1.

83. "Site" meant "the property identified on the relevant Site Schedule as pertaining to an Owner".

84. The "Site Schedule" was defined as "the site schedule, as set out in *pro forma* in Schedule 1, as may be entered into from time to time in accordance with clause 2.3 in respect of a particular Site". It therefore appears to have been the draftsman's intention that Schedule 1 would simply comprise a template or *pro forma*, with separate site schedules being completed from time to time as agreement was reached on the provision of services to specific sites. In the case of the 2009 Security Contract, however, Schedule 1 was not left as a blank template, but was completed to identify the Brunswick Centre as a site and the services to be provided as "*manned security guarding to the Shopping Centre and back of house areas*".

85. The "Agreement" was defined as including any schedule or annexure to the contract document itself, so that the site schedule formed part of the agreement.

86. Clause 2.3 provided for the parties to agree to the provision of services in relation to any particular site by completing and executing a new site schedule. Once executed each new site schedule was to be subject to the terms and conditions of the agreement.

87. The Commencement Date was defined in clause 1.1 as "the dates stated in the Site Schedules". The only use of that expression in the agreement is in clause 3, which makes the following specific provision concerning the duration of the agreement:

> "Subject to the provisions of clause 13, this Agreement shall come into effect on the Commencement Date and shall (unless earlier terminated pursuant to Clause 13) terminate automatically without notice on the third anniversary of the Commencement Date"

88. Clause 13 deals with termination. Clauses 13.2 and 13.3 give the Owner or its agent the right to determine the agreement for breach in specified circumstances. More generally clause 13.1 gives either party the right to terminate the agreement by giving to the other not less than three months notice in writing. Clause 13.5 permits the termination provisions to be exercised on a site by site basis.

89. The uncertainty over the duration of the agreement which is responsible for the second preliminary issue arises because of an apparent tension between the standard form of Site Schedule and the stipulation in clause 3 that the Agreement is to come into effect on the Commencement Date and terminate automatically without notice on the third anniversary of the Commencement Date, unless terminated before that date under the provisions of clause 13. The *pro forma* site schedule includes space for the parties to insert a "Start Date" and an "End Date". In the Site Schedule for the Brunswick Centre completed by the parties and signed on behalf of Senator on 5 November 2009, the "Start Date" was left blank but the "End Date" was completed in type script as 31 October 2010.

90. The leaseholders contend that the agreement was a qualifying long term agreement because it was entered into for a term of three years from the Commencement Date, as recorded in clause 3. The third and fourth respondents argue the contrary and say that the agreement was for a term of less than 12 months, having come into effect on 25 November 2009 (the date on the title page), with an end date of 31 October 2010 specifically identified in the Site Schedule forming part of the agreement.

91. For the leaseholders Mr Bates argued that the purpose of the site schedules was to identify the site and the services to be provided and not to set a termination date. The only contractual term limiting the duration of the agreement was clause 3 which clearly provided for a term of three years from the Commencement Date. If a new

site schedule was entered into by the parties during the initial three years then the duration of the agreement, so far as it related to that site, would be three years from the date stated in the schedule pertaining to that site. As he pointed out, the Commencement Date was defined in clause 1.1 as the "dates" stated in the "site schedules" (plural in each case) so what was contemplated was a series of site schedules each for a three year duration unless terminated by notice.

92. Although the agreement is not flawless, it is reasonably clear to me how it would be understood by commercial parties invited to enter into it. In my judgment Mr Bates' submissions give insufficient weight to the fact that the agreement was intended to be a framework agreement, under the umbrella of which the specific terms for each site were to be negotiated individually. It goes without saying that the agreement must be read and understood as a whole, and it is therefore inappropriate to fix on a meaning for clause 3 without regard to the contents of the *pro forma* site schedule which clause 1.1 stated specifically was to form part of the agreement. That schedule makes provision for a start date and an end date for the provision of services to each site; it does not employ the expression Commencement Date at all, despite the definition of that expression as "the dates stated in the Site Schedules". In context the Commencement Date is obviously the start date, but rather than look to clause 3 for the end date any reasonable party would understand that that date was the date stated in the site schedule.

93. It is not difficult to reconcile the discomfort which seems to exist between clause 3 and the site schedule. Clause 3 is dealing with the duration of the framework agreement. The site schedule determines the period for which it has been agreed that services will be provided to a specific site. If that was not the drafter's intention it is hard to think why an "end date" was included at all; if all contracts for individual sites were to last for three years unless terminated by notice given under clause 13 the invitation to the parties to specify an end date could serve only to confuse.

94. Even if the drafter did not intend the parties to have the flexibility to identify a start date and end date of their own, which might be different from the three year duration of the framework agreement itself, it is impossible to ignore what the parties have actually done. Mr Bates did not suggest any reason why the parties included 31 October 2010 as the end date in the Brunswick Centre site schedule. His argument requires that they must be taken to have failed to appreciate that the duration of their agreement would be defined by clause 3, and would be three years from the Commencement Date. His only answer to the problem created by the selection of an end date which was less than three years after commencement was to say that it was not the function of the site schedule to define the duration of the term. But that is to assume that the parties were in a contractual straight jacket which prevents proper effect being given to their agreed end date. That is not a legitimate technique of interpretation and by failing to give effect to an individually negotiated term for the sole reason that it is in conflict with a standard term it allows the tail to wag the dog. The general rule is to the opposite effect, in that individually negotiated terms should be given effect in preference to standard conditions if there is a clear conflict between them: *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715.

95. I therefore agree with the submission of Ms Lamont that it is quite obvious that the parties intended the agreement to end on 31 October 2010. I doubt that the omission of any "Start Date" was of significance; it may be that the services were already being provided by the time the agreement was executed (although there was no prior agreement with Senator); it may have been anticipated that the agreement would start on the day it was signed by both parties, or the next day, with that date being written in to the site schedule, as it was on the Brunswick Centre title page; it may simply have been omitted by oversight. In any event as the agreement was not executed by either party until 5 November the end date was less than 12 months after the commencement of the agreement which, as a result, was not a qualifying long term agreement for the purpose of the 2003 Regulations.

96. I should also mention, but not decide, a subsidiary argument relied on by Ms Lamont. She submitted that the inclusion in the 2009 Security Contract of a break provision exercisable by either party on 3 months' notice (clause 13.1) precluded the agreement from being one entered into for "a term of more than twelve months" within the meaning of section 20ZA of the 1985 Act. It followed (she suggested) that even if clause 3 of the framework agreement had the effect that the agreement would last for three years unless terminated by notice it would still not be a qualifying long term agreement.

97. Miss Lamont referred to two authorities. In *Paddington Walk Management Ltd v The Governors of Peabody Trust* [2010] L&TR 6, a decision of Her Honour Judge Marshall QC sitting in the county court, she held that a management contract expressed to be "for an initial period of one year from 1 June 2006" and thereafter continuing "on a year-to-year basis with the right to termination by either party on giving three months' written notice at any time" did not constitute a qualifying long term agreement. In *Poynders Court Ltd v GLS Property Management Ltd* [2012] UKUT 339 (LC), His Honour Judge Gerald, sitting in this Tribunal, distinguished *Paddington Walk* on the basis that there an initial fixed period had been specified. Ms Lamont was critical of the *Poynders Court* decision but it is not necessary for me to determine whether her criticisms were justified. I note only that, as a decision of the Upper Tribunal, *Poynders Court* is binding on first-tier tribunals, whereas *Paddington Walk* is not.

98. My answer to the second preliminary issue is therefore that the 2009 Security Contract was not a qualifying long term agreement.

Issue 3: Should the leaseholders' challenge to the cost of the 2005 major works be struck out as an abuse of process or because it is insufficiently particularised?

99. The parties concerned in the third preliminary issue are the leaseholders, Camden and Allied London.

Compliance with the Tribunal's "unless" order

100. In paragraph 37(d) of their amended statement of case dated 24 July 2015 the leaseholders challenge their liability to make a service charge contribution to the cost of the major works undertaken by Allied London in 2005. The basis of that challenge is that the works were not carried out to a reasonable standard. The only details of that allegation which the leaseholders were able to give had been gleaned from information provided by Camden since the works were carried out. The leaseholders assert that the waterproofing to the shopping precinct deck and the second floor terraces was defective, that new leaks had been reported, that movement joints were incomplete, asphalt work was poor, no sand finishes or reflective paint had been applied, and that there was visible cracking.

101. The leaseholders' amended statement of case had been prepared in the light of agreed directions given in April 2015 when the additional respondents, including Allied London, were joined as parties to proceedings which had previously involved only the leaseholders and Camden. In those directions the leaseholders agreed that they would "fully particularise" their claim in relation to the major works.

102. Both Camden and Allied London took the view that that the particulars provided in paragraph 37(d) of the leaseholders' amended statement of case were insufficiently precise to enable them to know what was really in issue. Following the transfer of the proceedings to this Tribunal, the leaseholders agreed that the allegation should be struck out unless within a specified time they produced a Scott schedule "identifying the specific items of expenditure in dispute under paragraph 37(d)". An order to that effect was made on 10 May 2016.

103. The leaseholders duly produced a Scott schedule identifying five broad categories of work, the cost understood to have been incurred in carrying it out, and the basis on which the leaseholders disputed their liability to contribute towards it. The smallest item complained of is a sum of almost £12,000 spent on the removal of the existing paving (presumably preparatory to the replacement of the waterproof membrane) while the largest item is the provision of new paving at a cost in excess of £500,000. The only details given of the leaseholders' complaints in the schedule are that the waterproofing works, of which each of the disputed items was a component, were defective. Reliance is placed on a letter written to all leaseholders at the Brunswick Centre on 19 March 2013 on behalf of the freeholder acknowledging that there had been problems with the 2005 major works and informing them that a decision had been made that the waterproofing membrane would be replaced entirely. The leaseholders rely on this letter as confirmation that the works were not done to a reasonable standard.

104. Camden and Allied London submitted at the hearing of preliminary issues that the leaseholders had failed to identify specific items of expenditure in dispute and that the effect of the Tribunal's order of 10 May 2016 was that the allegation that the works were not carried out to a reasonable standard had therefore been struck out.

105. I do not agree. The particulars given by the leaseholders do identify specific items of expenditure and do explain why the leaseholders say that the work was not done to a reasonable standard, namely, because it has had to be entirely re-done. The fact that the items of expenditure are identified in very broad categories is simply a reflection of the fact that the leaseholders' case is that the whole contract was executed to an unreasonable standard. No purpose would be served by breaking down the broad categories into individual items if, as the leaseholders contend, the whole of the work has had to be repeated.

106. I am therefore satisfied that the leaseholders have sufficiently particularised their case.

107. That does not mean that it is necessarily a case fit to go to a final hearing.

Abuse of process

108. For different reasons Allied London and Camden have each applied to strike out the claim in paragraph 37(d) as an abuse of process.

109. The first-tier tribunal (under whose rules these proceedings are continuing despite their having been transferred to this Tribunal) has jurisdiction to strike out the whole or a part of any proceedings if it considers them to be an abuse of process: rule 9, Tribunal Procedure (First-Tier Tribunal)(Property Chamber) Rules 2013.

110. In *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529, 536 Lord Diplock explained that the power to strike proceedings out as an abuse of process was part of:

> "… the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied."

111. Lord Diplock went on the say that if proceedings are found to be an abuse of process the court has a duty to strike them out, rather than a discretion to do so.

112. Beyond identifying very broad categories of abuse, judges have avoided drawing up rules to define more precisely when it will be appropriate to exercise the power. In *Laing v Taylor Walton (a firm)* [2007] EWCA Civ 1146 at [12], Buxton LJ explained how the court or tribunal should approach such applications:

> "The court therefore has to consider, by an intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute. Attempts to draw narrower rules applicable to particular categories of case (in the present instance, 8 negligence claims against solicitors when an original action has been lost) are not likely to be helpful."

Allied London's application

113. Allied London point out that they did not become party to these proceedings until February 2015, which was 11 years after their obligation to consult the leaseholders arose and 9 years after the works undertaken by them were completed. Allied London has had no interest in the premises since a sale in June 2007 and destroyed its records relating to the Brunswick Centre works 6 years after that sale.

114. On behalf of Allied London Ms Muir first submitted that there was no reason why the leaseholders could not have raised their complaints about compliance with the consultation requirements in 2004. That seems to me to be an irrelevant consideration. The leaseholders were not asked to pay the balancing payment for the works until 2013, and proceedings were not issued against some of them by Camden until 2014. The leaseholders were under no obligation to work out the grounds on which they might wish to challenge their liability to contribute towards the cost of the works, and to alert Camden to potential defences until the time came for them to file a defence. It is clearly not an abuse of process for the leaseholders to rely on defects in consultation. Nor, in practice, is it likely to be any more difficult for Allied London to make an application for dispensation from the consultation requirements now than it would have been in 2004.

115. Ms Muir next submitted that, because it had destroyed all of its relevant files in 2013, it would be unfair on Allied London for the leaseholders now to be entitled to challenge their liability to reimburse Camden in respect of its contribution towards the cost of the works. The quality of the works had been in issue since at least June 2007 and by January 2008 there had already been regular meetings between the leaseholders and representatives of Camden and the then freeholders in relation to the work. The leaseholders knew that they would ultimately be expected to contribute towards the cost of the works, as they received notices warning them of their liability in 2007; they ought at that time to have made clear their intention to challenge their liability, or at least to have done so at a much earlier stage.

116. I accept that that evidence of what works were carried out, the cost and quality of those works, the cost of remedying any defect and so on will now be very much more difficult for Allied London to obtain than would have been the case had the application been made before it destroyed its own files and before the works were rectified (by a subsequent freeholder). Any inspection now would be of no relevance

to the standard of the works undertaken by Allied London because remedial works have been done.

117. Nevertheless, none of these points seem to me to make it an abuse of process for the leaseholders to challenge their liability to contribute towards the cost of the major works through the service charge payable to Camden. The leaseholders only contractual relationship is with Camden. Difficulties which Allied London may experience in meeting a contingent restitutionary claim by Camden against it, cannot make it an abuse for the leaseholders to take legitimate points in their own defence against Camden.

118. It is also relevant that Camden does not suggest that it is prejudiced by the delay in the leaseholders making clear their intention to resist the claim for a contribution towards the major work. That is hardly surprising, as Camden is likely to have been continuously engaged in monitoring the quality of the works and in negotiating with the successive freeholders over the costs which it is liable to contribute towards.

119. The same answer applies to Ms Muir's final suggestion that, as far as Allied London is concerned, these proceedings are pointless. If the Tribunal determines that any service charge payable to Camden by the leaseholders was irrecoverable, Camden intends to seek restitution in respect of the same sums against Allied London. Camden paid Allied London for the major works in two tranches of £510,947 plus VAT and £678,964.40 plus VAT in 2005 and 2006. It is Allied London's case that any restitutionary claim would therefore be barred by section 5 of the Limitation Act 1980 which is said to impose a 6 year limitation period (see *Parissis v Blair Court (St John's Wood) Management* Ltd [2014] UKUT 503 (LC) para 21). In the alternative, if an equitable remedy is sought, Allied London says that it will also be barred on the grounds of delay under the equitable doctrine of *laches*. For those reasons it asserts that its continued participation in the proceedings is pointless.

120. The availability of these suggested defences was disputed by Mr Upton on behalf of Camden, and I express no views on them, but it is necessary to remember that the application to strike out is made by Allied London against the leaseholders and not against Camden. Once again, I do not see how it can be said to be an abuse of process by the leaseholders to take legitimate points in their own defence against Camden simply because Camden may experience difficulty in pursuing a consequential claim against Allied London.

121. Allied London's application to strike out the claim that the major works were not done to a reasonable standard is therefore refused.

Camden's application

122. Camden's application to strike out the allegation that the major works were not done to a reasonable standard is made on different grounds. Mr Upton suggested that the proceedings were pointless because they could result in no benefit to the leaseholders. He drew attention to the following aspects of the history of the works undertaken at the Brunswick Centre.

123. The major works, which included the installation of a waterproof membrane at podium level, were commenced in March 2005 and were largely complete by the end of November 2006. Seven months later, in June 2007, Allied London disposed of its interest in the Brunswick Centre.

124. In January 2008 Camden informed the leaseholders that it had raised concerns regarding the quality of the work with the freeholders (the third and fourth respondents). Camden nevertheless considered it was reasonable to issue bills for the leaseholders' contributions, which it did. Camden also explained that it was in discussion with the freeholders about outstanding works and that any agreed reduction to the costs would be passed on to the leaseholders.

125. More than a year later, on 16 April 2009, Camden wrote again to the leaseholders, informing them that "due to water ingress issues" it had been agreed that the leaseholders could withhold their contributions to the cost of the major works "until the problems are resolved satisfactorily … the invoice will become due within any remaining interest free period or 21 days of resolution depending on circumstances once the issues are resolved."

126. The final practical completion certificate in respect of the works was issued in September 2009, but it seems apparent that the problems experienced since 2006 had not been resolved. On 19 March 2013 the freeholders' agent, GL Hearn, wrote to the leaseholders informing them that since the completion of the works there had been leaks into premises and basements; that these had been repaired as they arose; but that that it was now clear that the problem was "across the whole of the mall and podium levels"; and that the freeholder intended to replace the waterproof membrane in full at its own cost and that no costs would be charged to Camden or its leaseholders.

127. In March 2013 Camden informed its leaseholders that the costs of the major works had been finalised and demanded the leaseholders' contribution as part of the service charge for that accounting period.

128. In his skeleton argument Mr Upton informed the Tribunal that, as far as Camden is aware, the waterproof membrane has been replaced and any defective work had now been remedied. At the hearing, however, he corrected that statement and informed the Tribunal that although most of the remedial work had been done, a number of issues remained to be resolved. These were within the scope of the agreement between Camden and GL Hearn, on behalf of the current freeholder, and

therefore would be completed by the freeholder at no cost either to Camden or to the leaseholders.

129. Mr Upton pointed out that the Leaseholders do not challenge the costs of the major works. By that he meant that the challenge was to the quality of the works and it was not suggested that, if the works had been done to a reasonable standard, the costs incurred would have been unreasonable. That appears to be the leaseholders' position.

130. On that basis Mr Upton submitted that even if the major works had not initially been carried out to a reasonable standard (as seems clearly to have been the case given that extensive remedial works have been necessary), the leaseholders will not benefit from a determination to that effect. That was because the freeholder had agreed pragmatically to forego its entitlement to recover the cost of the remedial works as part of the service charge for the accounting period in which the remedial works were undertaken. The works carried out over the entire period 2005 to 2016 would achieve the original objective of the major works contract at no greater cost to the leaseholders than they accepted was a reasonable cost for those works.

131. Mr Upton invited me to conclude that any detailed investigation into the quality of the major works carried out in 2005 and 2006 would be pointless and would bring the administration of justice into disrepute.

132. Although at first sight Mr Upton's analysis may appear unorthodox, I agree up to a point with its logic.

133. If all parties had insisted on their strict rights a determination of the leaseholders' liability to contribute towards the costs of the major works, and their remediation, might have involved a number of steps. The cost of each element of the original works and the remedial works would have been included in the service charges for the years in which those costs were incurred. Each year's service charge contribution would be liable to be reduced on the grounds that the work was not of a reasonable standard. Eventually the whole programme of waterproofing works would have been done again, as GL Hearn announced in their letter of 19 March 2013. If that work was successful and of reasonable quality, the scope for the leaseholders to challenge their liability to pay for it would be very limited. The most that might have been said is that the cost was not reasonably incurred, because the works ought to have been done properly at the first attempt. It is not obvious that that submission would have entitled the leaseholders to a reduction in their liability to contribute towards the successful works, especially as the freeholder which carried them out was not the same freeholder as had carried out the original works.

134. Thus if the service charge provisions in Camden's Headlease and in the sub-leases of the individual flats had been implemented strictly in accordance with their

terms, the best outcome the leaseholders could hope for would be that their liability would be limited to the reasonable cost of carrying out the original works, but their liability might be greater.

135. Thankfully that sequence of repeated annual claims in respect of different elements of the works, including the remediation works, has been avoided. Camden sensibly agreed not to collect the service charges in respect of the original works until the defects had been put right. The current freeholder has constructively conceded that the defective works will be put right at no additional cost to Camden or the leaseholders. The expensive intermediate stages of assessment have therefore been omitted and Camden seeks no more than the cost of the works originally undertaken which, the leaseholders do not dispute, would have been a reasonable price had the job been done properly.

136. To the extent that the leaseholders made contributions in advance to the cost of the original works, my provisional view is that in the unusual circumstances of this case the "necessary adjustment" to which they would be entitled under section 19(2) of the 1985 Act would need to take into account the fact that remedial work has been carried out, at no additional cost, to correct defects in the original works. The limitation imposed by section 19(1) on the final amount payable would also have to have regard to that fact. When determining whether the works have been carried out to a reasonable standard the whole package of works, for which a single contribution only is being sought, ought to be considered together. Once the works have finally been completed it would be unrealistic for the leaseholders to expect section 19 to secure them a reduction in the sum claimed for the original programme, when the remedial works will have been carried out at no expense to them.

137. I would have agreed with Mr Upton that a detailed investigation of the original works would have been pointless, had it been common ground that all of the defects in the original works have now been corrected. However, as it is in fact agreed that further work remains to be done and several issues are still to be resolved, I cannot accept that this part of the proceedings have been shown to serve no purpose. It is not yet possible to say that the leaseholders have obtained full value for the disputed service charge contributions. It must therefore be open to them to challenge the contributions they have been asked to make on the grounds that the work has not yet been carried out to a reasonable standard.

138. I am therefore satisfied that the leaseholders' case that the major works were not completed to a reasonable standard, and that their contributions should be reduced a result, is not an abuse of process. The Tribunal is under no duty to strike out that part of the claim and Camden's application is refused.

139. I am, however, convinced that the expenditure of substantial sums in the preparation of expert evidence concerning the standard of the original works, and the use of the time and resources of the Tribunal and of the parties in investigating the

quality of those works, would be wasteful at this stage. The leaseholders advance no positive or detailed case concerning the defects in the works; they simply dispute their liability in its entirety and leave it to others to justify the sums claimed. That might be a legitimate tactic where all of the works had been completed, but in this case further remediation is understood to be in progress and the liability of the leaseholders cannot be ascertained until it has been completed. If the remediation measures are successful there should be nothing left in dispute since, belatedly, works of a reasonable standard will have been carried out at a reasonable cost.

140. In the course of argument Mr Bates, who appeared on behalf of the leaseholders, acknowledged that it would be extremely complicated to determine the extent of the leaseholders' liability to contribute to the cost of the original works. I agree, but I consider that it would also be pointless to do so at this stage because the quality of the works as a whole cannot yet be assessed. I therefore direct that further consideration of the issues raised in paragraph 37(d) of the leaseholders' amended statement of case, and in the Scott schedule which supplements it, be stayed.

141. The parties have permission to apply to lift the stay once the remedial works about which the Tribunal was informed have been completed and it is known whether they have been successful. If the leaseholders wish to apply to lift the stay they must support their application with a clear explanation of the basis on which they dispute their liability. If they contend that defects are still present, after completion of all of the remediation works, in those parts of the Brunswick Centre which were the subject of the 2005 major works, they should support their application to lift the stay with the report of a building surveyor specifically identifying those defects.

142. If no application has been made by either party by the time the Tribunal gives its decision on the remaining issues (which are currently due to be heard in April 2017) the Tribunal will give further directions.

Martin Rodger QC
Deputy President

10 August 2016